No. 15021

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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Jurisdictional Statement.

Appellant, Eugene Rayson, and one Ollie W. Kelley, were indicted November 16, 1955, by the Federal Grand Jury at Los Angeles, California. [R. 3-6.] The indictment was in three counts: Count I charged defendants Kelley and Rayson with conspiring to possess, sell and conceal narcotics in violation of Title 18, United States Code, Section 371; Count II charged the defendants with unlawful receipt, transportation and concealment of approximately 2 ounces, 82 grains of heroin, in violation of Title 21, United States Code, Section 174;[1] Count III charged the defendants with unlawfully selling and facilitating the sale of approximately 2 ounces, 82 grains of

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[1]Quoted in Appendix.

heroin, to one Norman Fletcher (also known as Albert Fletcher), in violation of Title 21, United States Code, Section 174. The defendants were arraigned [R. 6] and each of them plead *not guilty* to all three counts of the indictment.

The case was tried before Honorable Harry C. Westover, Judge, without a jury [R. 7], a jury having been waived. The Court found Ollie W. Kelley [R. 8] not guilty on all three counts. The Court found Eugene Rayson not guilty on Count I, but guilty on Counts II and III.

A motion for a new trial was made on behalf of Rayson [R. 9-12] and denied. The Court sentenced Rayson to three years imprisonment on each of Counts II and III, the sentences to run concurrently, and ordered Rayson to pay a fine to the United States of America in the sum of $5.00 on each of Counts II and III, making a total fine of $10.00.

Rayson appealed to this Court from the judgment and sentence of the District Court. [R. 12-13.] Appellant Rayson is at liberty on bail fixed by the District Court pending his appeal. Statutory provisions and authority to sustain the jurisdiction of this Court are Sections 1291 and 1294(1) of Title 28, United States Code.

Statement of the Case.

The Government called five witnesses: Norman (Albert) Fletcher [R. 79], an informer for the Federal Bureau of Narcotics; Malcolm Richards [R. 132], an agent for the Federal Bureau of Narcotics; William J. Gowans [R. 227], a chemist employed by the Internal Revenue Bureau; the other two Government witnesses, Algy F. Landry [R. 285] and William R. Farrington

[R. 215] are Deputy Sheriffs of Los Angeles County assigned to the Narcotics Division of the Sheriff's Office.

Norman (Albert) Fletcher, the principal Government witness and the only witness for the Government who had any personal contact whatever with the appellant, Rayson, is an informer [R. 79-85] in the employ of the Federal Narcotics Bureau. Fletcher says he is 35 years old. [R. 74.] He came here from Louisiana during the year 1949. He had two prior narcotics convictions, one federal and the other state, in his native state of Louisiana. [R. 74.] He was convicted the third time for a narcotics offense in the Superior Court of Los Angeles County, California, and served a term in Folsom Penitentiary. [R. 75.] As soon as he got out of Folsom he went back to his old profession of a narcotics peddler. [R. 76.]

In February, 1955, Fletcher was arrested by the federal authorities in Los Angeles for possession of narcotics [R. 79] and brought before the Federal Commissioner there who released him on his own recognizance. [R. 84-85.] On what theory the Commissioner released Fletcher is not clear; he was released to officers of the Federal Narcotics Bureau at Los Angeles, and attached to Malcolm Richards of the Bureau. Fletcher escaped trial on the charge by what he says to have been cooperation with and employment by the Federal Government as an undercover agent. [R. 80-81.] Fletcher said, in response to questions by the Court [R. 81], that he was released to the officers by promising to work with them to apprehend "the bigger peddlers—narcotics peddlers."

Rayson ran a smoke shop at 3326 South Main Street, Los Angeles. The smoke shop was operated as a recreation club, at which tobacco and soft drinks were sold.

Fletcher was accustomed, from June, 1955, until the arrest of appellant, to visit the smoke shop from time to time. [R. 267-268.]

The conviction in this case rests entirely upon the testimony of the informer, Fletcher, already a three time loser under indictment for a fourth narcotics offense, and upon the testimony of Federal and State Narcotics Officers as to the contents of telephone conversations claimed to have taken place between appellant Rayson and the witness Fletcher, which were intercepted by the Federal and State Officers, and which were recorded by means of telephone and wire tapping instruments.

It is apparent that Fletcher went all out to get the defendants, his motive being to save himself or to assist as far as possible in getting himself freed from the pending narcotics charge, filed against him February, 1955. It is not clear from the record whether Fletcher got in touch with Rayson or Rayson got in touch with Fletcher. Fletcher claims that Rayson telephoned him. [R. 28.] According to Fletcher, Rayson telephoned the first time, September 14, 1955, at Agent Richards' house, using a telephone number Fletcher said he had given to Kelley the day before. [R. 110-111.] At this first telephone conversation on September 14, 1955, Fletcher said he told Rayson he wanted to get in touch with him to purchase "some stuff" [R. 111-112]; and Fletcher said that he made an appointment with Rayson to meet him that day at 58th and Hoover, Los Angeles, at 11:00 in the morning.

Fletcher said that he met Rayson at the appointed time and place and gave him $700.00 for 2 ounces of heroin, which Fletcher said Rayson was to deliver to him later that day. [R. 112-114.] Fletcher claimed that Rayson got into Fletcher's car where he gave him the $700.00. [R. 112-113.] At the time Fletcher had a recording device on his person which would pick up all the conversation between him and Rayson. [113-114.] What was on that recording device remains a secret between the narcotics officers and their informer. Rayson admitted that he met Fletcher at the appointed place and did collect $50.00 from Fletcher [R. 272] which was the payment of a loan that Rasyon had previously made to Fletcher. [R. 269.]

Fletcher said he was searched before he went to talk with Rayson by the narcotics officers who gave him $860.00 to make the purchase. [R. 140.] When Fletcher returned after seeing Rayson neither he nor his car was searched to find out whether he still had the money or had parted with the money and procured the heroin. The officers allowed him to leave and go to Beverly Hills, fifteen miles away, to visit his girl friend and be gone for about two hours.

It is the contention of the appellant that Fletcher went out to see his girl friend and left the $700.00 with her, and during that time planted the heroin under the railroad sign at Budlong and Slauson, where it was later picked up by Fletcher and officer Richards. Fletcher returned from the visit to his girl friend in Beverly Hills, and

his testimony is [R. 40] that Rayson conveniently telephoned him at officer Richards' house about 6:30 P. M. to tell him where to pick up the heroin. Officers Richards and Farrington and Fletcher were present and recorded the conversation with a telephone recording machine. [R. 146, 203.]

There is no proof of any kind in this case that Rayson was the man on the other end of the telephone in any of the conversations, except that Fletcher claimed that he could recognize his voice, an easy claim upon which any person could be convicted upon the testimony of an informer who was interested in keeping the $700.00, and at the same time disposing of some narcotics he probably procured from his girl friend and deposited under the railroad sign. Again, at both of these telephone conversations, on the 14th, upon which the whole case hinges, a recording device was attached which recorded all that was said.

Timely objections to the introduction by the Government of the telephone conversations were made by appellant and overruled; these objections were followed by motions to strike the testimony, which were denied [R. 69, 129, 231-236]; a motion for acquittal was made and denied [R. 237-240]; and all of the questions so raised were urged on a motion for new trial which was denied. [R. 8, 12.]

Specification of Errors.

1. The District Court erred in ruling that the telephone conversations between the witness Norman Fletcher and appellant Eugene Rayson, a recording instrument being attached to the telephone and recordings made of such conversations, were admissible over the objections of appellant.

2. The District Court erred in ruling that the telephone conversations between the witness Norman Fletcher and appellant Eugene Rayson, the same being listened to by other persons, were admissible over the objections of the appellant.

3. The District Court erred in holding that the evidence obtained by the telephone conversations was admissible and that the same was not barred by the provisions of 47 U. S. C. 605.

4. The District Court erred in denying appellant's motion to strike the testimony of the telephone conversations between the witness Norman Fletcher and appellant Eugene Rayson, a recording instrument being attached to the telephone and recordings made of such conversations.

5. There is no evidence to show that appellant Eugene Rayson did ever receive, conceal or transport or facilitate the concealment or transportation of the narcotic drug charged in count II of the indictment, and the finding of guilty on this count is clearly erroneous.

6. There is no evidence to show that appellant, Eugene Rayson, did ever sell or facilitate the sale of a certain narcotic drug to one Norman Fletcher, as charged in count III of the indictment, and the finding of guilty on this count is clearly erroneous.

7. The District Court erred in denying appellant's motions for acquittal made at the close of the prosecution's case.

8. The District Court erred in denying appellant's motion for a new trial.

To comply with Rule 18 (d) of this Court, relating to the prescribed method of raising on appeal errors in the admission and rejection of evidence, appellant presents the following objections and summaries of the evidence as applicable to Specification of Errors, Numbers 1, 2, 3 and 4.

Government witnesses Fletcher, Richards, and Farrington all testified that there were four telephone calls from appellant to Government informer Fletcher, September 14, 1955. The testimony of the officers and the informer was that the first three of these calls were for the purpose of making appointments for Rayson and Fletcher to meet. The testimony of the telephone conversations is very vague but, given the strongest implications and inferences, the conversations amounted to solicitation by the informer Fletcher of Rayson to sell Fletcher "some stuff" and to make appointments where they could meet and talk the matter over, settle the price and plan the delivery of some heroin. [R. 29, 36, 38, 41, 116-117, 123, 143-144, 146-147, 196, 197, 201, 202, 204, and 217-221.]

The fourth one of these calls was late in the afternoon when the officers claimed that Rayson said over the telephone to Fletcher that the "stuff" could be found under a railroad sign near the intersection of Budlong and Slauson Avenues in Los Angeles.

A regular recording machine for recording telephone conversations was attached to the telephone during all

four of these conversations and Fletcher and the two officers, Richards and Farrington, listened in and heard the conversations and testified to them at the trial.

At the conclusion of the direct examination of informer Fletcher, appellant moved to strike his testimony because it appeared by this time that Federal Officer Richards and Deputy Sheriff Farrington were listening in on the conversations. The motion to strike was made on the ground that receiving the testimony "violated the defendant's rights under Article IV and Article XIV of the Constitution of the United States," and because such testimony "is not admissible and cannot be used to convict the defendant because it is an invasion of his right of privacy." [R. 69.]

The Court denied the motion to strike on the ground that the receiver was held close enough to the ears of the three present so that all could hear. At this time there was no evidence that the line had been tapped. The Court stated:

> "Let's assume, Mr. Neblett, A and B are carrying on a telephone conversation. If C taps that line somewhere and listens in, of course, it is illegal." [R. 71.]

At this point [R. 72] the District Attorney, Mr. Jensen, said that he "did not want any misapprehension about what occurred in this instance. As a matter of fact, these telephone conversations were in part recorded. That is not presently in evidence." The Court then stated [R. 73] that it could not rule on something not before the Court; and that "if it appears later that there was an interception, I am going to reverse my ruling."

On cross-examination Fletcher admitted that all of the telephone calls on September 14, 1955, were recorded.

[R. 123.] Officer Richards also testified, on cross-examination, that all of the telephone calls on September 14, 1955, were recorded on the recording machine tapping the telephone line [R. 202-204.]

With the permission of the Court, rulings on the objections were deferred until it had appeared clearly from the testimony of the Government witnesses that the telephone line was tapped during all of the supposed conversations between Rayson and the informer Fletcher. [R. 231.] At pages 232-233 of the record, counsel for appellant stated:

> "If your Honor please, I can't specify in any more particularity than moving to strike the testimony of the witness Fletcher and the witness Farrington and the witness Richards as to their testimony relating to that part of the evidence which has been produced by the government on the proposition that certain telephone conversations were made to the house of Richards on his telephone number, and to that telephone was attached a listening device which the government has shown was attached, a tape recorder, and it has been testified here that the tape recordation was somewhat indefinite, but you could listen to it several times and tell what it said, so I assume that the testimony that they are giving here is testimony they learned from this tape recorder which they have not yet offered in evidence.
>
> I feel that the motion to strike could be well taken upon the ground that obtaining evidence in that manner is in violation of Section 605, I believe it is, 47 USCA."

The Court denied the motion to strike. [R. 237.]

The question of wire tapping was again raised on motion for a new trial. The Court denied the motion. [R. 11-12.]

Summary of Argument.

(A) The appellant was convicted on evidence obtained by the Federal and State officers, in violation of the Federal Communications Act, Title 47, United States Code Section 605, which forbids the interception of any telephone communication and the disclosure of the intercepted communication or any part of it. Under the facts of this case, as already outlined, the point seems to have been definitely settled in favor of the appellant by a recent decision of this Court, necessitating a reversal of his conviction on both counts.

United States v. Sugden (C. A. 9, Nov. 10, 1955), 226 F. 2d 281, certiorari granted;

Sugden v. United States, 76 S. Ct. 342, affirmed 76 S. Ct. 709.

(B) The finding that the appellant was guilty under counts II and III of the indictment is clearly erroneous, as there is no competent evidence or, in fact, any evidence at all, to show that appellant Rayson ever received, concealed, transported or facilitated the concealment or transportation of a narcotic drug, or ever sold or facilitated the sale of a narcotic drug to Norman Fletcher. This Court may reverse appellant's conviction under its power to correct "plain error."

Fed. Rules Crim. Proc. Rule 52(b);

Din v. United States (C. A. 9, March 2, 1956), 232 F. 2d 283.

ARGUMENT.

I.

As has been pointed out, *supra,* United States Code Title 47, Section 605, forbids the interception and disclosure of any telephone communication when not authorized by the sender. In the case of *United States v. Sugden* (C. A. 9, Nov. 10, 1955), 226 F. 2d 281, the defendants were indicted for conspiracy to violate the immigration laws by employing Mexican nationals, commonly called "wetbacks," on their farm and taking various steps to hide them and to avoid being caught with them in their employ. The defendants had a private radio. An agent of the Federal Communications System intercepted their broadcasts. This Court held that the use in evidence of the intercepted material obtained by the agent, monitoring the broadcasts, at the time when the station and the Sugdens were licensed, was forbidden by United States Code Title 47, Section 605.

In the opinion in *United States v. Sugden,* this Court has succinctly stated the rule applicable to the case at bar, as follows:

> "The Government must concede that if the facts were the same save that Stratton had tapped the Sugdens' telephone line and obtained the same information without the Sugdens' consent as he did by monitoring the air waves, then the trial court's rulings were correct. Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298."

II.

Appellant contends that the findings of guilty on counts II and III are clearly erroneous and constitute "plain error." All that the testimony of the government witnesses shows is that there were some telephone conversations September 14, 1955, the object of the telephone conversations being to set up a deal for the purchase by Fletcher of some heroin. There is no credible testimony that the person who was talking to Fletcher over the telephone was Rayson. True, Fletcher said that he recognized Rayson's voice. There is no contention that the officers who tapped the telephone line and listened in on the conversations knew who was on the other end of the telephone. The testimony that appellant met Fletcher at 58th and Hoover is fully explained by appellant's testimony that he met Fletcher there to collect the loan of $50.00 which Fletcher owed him.

Any hypothesis consistent with innocence overrides one that is consistent with guilt. Fletcher, a three time loser, had every possible motive to bring about the conviction of Rayson to save himself from being convicted on the pending charge, in which the minimum penalty was ten years.

The biggest weakness in the government's case is the dereliction of the officers in allowing Fletcher, immediately after he was supposed to have paid $700.00 to Rayson, to leave the officers and be absent for two hours, which would have given him ample time to dispose of the money he said he had paid Rayson and to pick up some heroin

and plant it under the railroad sign at Budlong and Slauson Avenues, in Los Angeles.

On these facts the conviction of appellant on counts II and III of the indictment is clearly erroneous, not sustained by any competent evidence whatever, and certainly not by that type of evidence which proved his guilt beyond a reasonable doubt, which the government had to do to secure his conviction.

Appellant respectfully contends that his conviction should be reversed.

Respectfully submitted,

WM. H. NEBLETT,

Attorney for Appellant.

APPENDIX.

Title 21, U. S. C., Section 174.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney

whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 47, U. S. C., Section 605.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a

subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.